UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI

SAMUEL K. LIPARI	)
Plaintiff,	)
v.	) Case No. 06-0573-CV-W-FJG
	)
GENERAL ELECTRIC COMPANY	)
GENERAL ELECTRIC CAPITAL BUSINESS	)
ASSET FUNDING CORPORATION,	)
GE TRANSPORTATION SYSTEMS GLOBAL	)
SIGNALLING, LLC.	)
Defendants.	)

MOTION FOR RECUSAL UNDER 28 U.S.C. § 455(a) and (b)(4)

Comes Now the plaintiff Samuel K. Lipari appearing *pro se* and respectfully requests recusal of the trial judge in this matter.

STATEMENT OF FACTS

1. Hon. Judge Gaitan is a Director of St. Luke's Health System, Inc. in Shawnee, Kansas

http://www.judicialwatch.org/judges/2005/gaitanfj.pdf at page 1 See Attachment 1

2. St. Lukes Health System is an owner of VHA/Novation and does over $97 million dollars of business with them.

> "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of $97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7 See Attachment 2

3. The plaintiff's complaint at ¶¶ 78-80 identifies Neoforma, Inc. a direct competitor of the plaintiff's owned by VHA and Novation and therefore St. Luke's Health System, Inc.

> "78. In March, 2006 GE CAPITAL funded the purchase of Neoforma, an electronic marketplace competitor of Medical Supply Chain, Inc.
> 79. Neoforma has never been profitable: "Neoforma's balance sheet shows a cumulative loss of nearly $739 million dollars as of Sept. 30, 2004." Healthcare
> Purchasing News March 2005.
> 80. "In 2005, in accordance with GAAP, Neoforma's net loss and net loss per share were $35.9 million dollars and $1.81 per share respectively, an improvement from the $61.2 million dollar net loss and $3.17 net loss per share recorded in the prior year." Neoforma, Inc. press release SAN JOSE, CA USA 02/26/2003."

4. VHA and Novation's sale of Neoforma was required because Novation was having to support

Neoforma losses with $61.0 million dollars a year:

> **"Independent Consultants Engaged to Assess Neoforma's Offering to Novation**
>
> **San Jose, CA - January 26, 2005 -** I n connection with Neoforma, Inc.'s (NASDAQ: NEOF) decision to evaluate strategic alternatives, Neoforma, a leading provider of supply chain management solutions for the healthcare industry, and Novation, LLC, Neoforma's principal customer, each have engaged independent consultants to assess the technology, information, services and pricing provided by Neoforma to Novation and its owners, VHA Inc. and University HealthSystem Consortium (UHC), and their member hospitals under an exclusive outsourcing agreement. Neoforma announced on January 11, 2005 that it had retained Merrill Lynch & Co. as its financial advisor to assist the Company in evaluating strategic alternatives, including a possible sale or merger of the Company, to achieve greater stockholder value. VHA and UHC own 42.4% and 10.5%, respectively, of Neoforma's outstanding common stock.
>
> The current 10-year exclusive outsourcing agreement, which was originally entered into in March 2000, was most recently amended in August 2003 as a result of negotiations between the parties to the contract. Under the terms of that amendment, the quarterly maximum payment from Novation to Neoforma was established at $15.25 million, or $61.0 million per year, beginning in 2004. Since that time, Neoforma has documented significant value delivered by its offering to VHA and UHC hospitals. In 2004, approximately 280 VHA and UHC hospitals, representing a subset of Neoforma's customer base, documented approximately $100 million in value by using Neoforma's solutions to drive supply chain improvements within their organizations. Based on the value of its offering to Novation and to VHA and UHC hospitals, Neoforma believes that it is a valuable contributor to Novation, VHA and UHC maintaining their competitive position in the industry and to their hospitals' efforts to improve supply chain efficiency…"

5. The plaintiff is in litigation against VHA and Novation, both owned by Hon. Judge Gaitan's hospital in a related case first filed in Missouri District court , then transferred to Kansas District court and now on appeal in the Tenth Circuit. *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210 KS Dist. Court case no.:05-2299, 10th Cir. case No. 06- 3331.

6. The plaintiff's antitrust lawsuit against VHA and Novation alleges that the cartel secures anticompetitive long term exclusive contracts with hospitals through kickbacks to hospital boards of directors and the award of lucrative personal consulting agreements in a conflict of interest with their respective institutions.

> **"a. The defendants' hospital group purchasing enterprise**
> 134. Robert J. Baker, UHC, Curt Nonomaque and VHA distribute hospital supplies by corrupting administrators in health systems (hospitals, hospital groups and independent distribution networks) that support the provision of services or provide services to Medicare, Medicaid and Champus funded patients. UHC and VHA employ marketing schemes that provide remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b.
> 135. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage health systems to violate § 1320a-7b(b)(1) by receiving unlawful remunerations which are labeled as "rebates" and are paid periodically based on the products used by the health system and its loyalty to the terms of the anticompetitive exclusive agreement with the group purchasing organization, UHC, VHA or Premier which control 70% of the hospital supply market.

136. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage their member hospitals to believe the group purchasing organizations are saving money by communicating the "value" of the rebates they are receiving as contrasted against the constantly increasing prices of hospital supplies allowed into UHC, VHA's distribution system.
137. The corrupting subtext of Robert J. Baker, UHC, Curt Nonomaque and VHA's marketing scheme is knowingly encouraging that third party payers, chiefly Medicare, Medicaid and Champus are billed for the artificially inflated list price, not the actual cost to the health system once the cash and cash substitute remunerations are factored in.
138. Robert J. Baker, UHC, Curt Nonomaque and VHA violate § 1320a-7b(b)(2) because they knowingly and willfully pay and offer to pay the unlawful remunerations. To provide cover for the spiraling prices in the product lists of chosen hospital suppliers who are protected from competition in UHC and VHA's captive market, Robert J. Baker, UHC, Curt Nonomaque and VHA generate flawed studies that extol the discount in the form of rebates as a savings over the monopoly "list" price for healthcare supplies.
139. The constant threat to the corrupt marketing scheme employed by UHC and VHA is access to real data from which to evaluate the actual costs imposed upon member hospitals by the artificially inflated distribution system, which would be destabilized by independent actions of participating hospitals and suppliers.
140. Robert J. Baker, UHC, Curt Nonomaque and VHA have protected against this destabilizing by forcing hospitals and suppliers into long-term anticompetitive exclusive dealing contracts that harshly penalize every violation. Out of a misguided fear of antitrust liability, the contracts typically assign market share limiting each health system to 95% of its purchasing through the dominant group purchasing organization and require a token share of products to be purchased through a "competing" group purchasing organization.
141. Robert J. Baker, UHC, Curt Nonomaque and VHA have also commanded loyalty among member health systems by making cash and cash substitute payments to health system board members and chief administrators in return for participation in the cost inflation scheme.
142. Many forms of the Defendants' cash and cash substitute payments to hospital administrators are concealed as "consulting contracts" and are not reported to Medicare, Medicaid or Champus or subtracted from the costs of hospital supplies transferred to third party payers.
143. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC have made use of payments to a third party in which hospital CEO's are stakeholders in order to conceal the commercial bribe nature of the payments. An organization called the Healthcare Research and Development Institute (www.hrdi.com) has existed since the late 1990s. HRDI has approximately 35 members who are hospital CEOs (many are heavily involved in supporting GPOs). The Institute's clients are large manufacturers, publishers, and large consulting firms. Each client pays the Institute and the members of the Institute, who are also its shareholders, are paid out of the profits of the organization. For hospital CEOs to personally receive payments from companies that they do business with is a serious conflict of interest and a failure to fulfill their fiduciary responsibility."

¶¶ 134-143 of plaintiff's action *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210.

MEMORANDUM OF LAW

The federal recusal statute, 28 U.S.C. § 455(a), requires that "any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The appearance of partiality – and not actual bias – is the test for recusal under Section 455(a): "In applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." *United States v. Cooley*, 1

F.3d 985, 993 (10th Cir. 1993).

Congress established the “appearance of impartiality” standard “to promote public confidence in the integrity of the judicial process.” *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 860 (1988). The legislative history of § 455(a) is clear:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge’s impartiality, he should disqualify himself and let another judge preside over the case.

H. Rep. No. 93-1453, p. 5 (1974), U.S. Code Cong. & Admin. News 1974, p. 6355. In the words of the Seventh Circuit, “Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done.” *Durhan v. Neopolitan*, 875 F.2d 91, 97 (1989).

The facts of Hon. Judge Gaitan’s fiduciary interest in St. Luke’s Health System, Inc. and its ownership interest in VHA/Novation , alleged by the plaintiff’s complaint to be acting in concert with the defendants over the sale of the plaintiff’s competitor Neoforma to prevent the plaintiff from entering the hospital supply marketplace more than satisfy Section 455(a), which mandates recusal merely when a Justice’s impartiality “might reasonably be questioned.” Independently, the plaintiff’s ongoing litigation against VHA and Novation also mandates recusal under Section 455(a).

It is beyond contest that Hon. Judge Gaitan as a fiduciary through being a Director of St. Luke’s Health System, Inc. with an ownership interest in VHA/Novation which the plaintiff is suing in a related action requires Hon. Judge Gaitan’s recusal under 28 U.S.C. § 455(b)(4).

Whereas for the above mentioned reasons, the plaintiff who has not forfeited his right to remand this action back to state court now respectfully requests that the judge hearing this matter recuse himself.

Respectfully submitted,

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Samuel K. Lipari *Pro se*

Certificate of Service

This is to certify that a copy of the foregoing notice was mailed postage pre-paid along with a copy of the Proposed Order, this 8th day of November, 2006, to the following:

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

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